Supreme Court, U. S.
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Supreme Court No. 75-1339

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

RONALD WILSON,
Petitioner,

-vs-

UNITED STATES OF AMERICA,
Respondent.

Court of Appeals
No. 75-2089

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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This case raises important questions of federal constitutional law concerning (1) the time in which federal search warrants issued pursuant to former F. R. Criminal Procedures 41(c) should be executed, along with (2) the voluntariness and admissibility of statements made by Defendant, following his arrest and handcuffing while nude and surrounded by at least ten federal agents and (3) who presented no objective evidence of a voluntary waiver	4
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Court of Appeals
No. 75-2089

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, by and through his attorney, prays that a Writ of Certiorari issue to review the judgment heretofore entered against him by the United States Court of Appeals, Sixth Circuit.

1. OPINIONS BELOW

On May 18, 1973, in an amended Opinion and Order, the trial judge granted defendant's motion to suppress, *United States* v *Wilson*, 60 FRD 55 (ED Mich 1973). On February 14, 1974, the United States Court of Appeals, Sixth Circuit, reversed the District Court decision in a *per curiam* opinion. *United States* v *Wilson*, 491 F2d 724 (6th Cir, 1974). The opinion of the United States Court of Appeals,

Sixth Circuit, affirming Petitioner's conviction in the District Court entered February 16, 1976, and judgment in accordance with that opinion, hereinafter set forth (Appendix A, *infra*, pp. 1a-2a), is not yet officially reported.

2. JURISDICTION

The Judgment of the United States Court of Appeals, Sixth Circuit, was entered on February 16, 1976. The jurisdiction of the Court is invoked under Title 28 USC §1254(1).

3. QUESTIONS PRESENTED

The questions presented by this petition are as follows:

I. Where probable cause for the issuance of a search warrant was based upon two observations of defendant's possession of small amounts of suspected heroin made on the date of issuance of the warrant and some forty-six days before, and upon a telephone conversation wherein defendant allegedly discussed his selling drugs to an informant forty-one to sixty-one days before the warrant was issued, probable cause was not shown to exist for a search executed under the warrant some six days after its issuance, and evidence obtained from such search must be suppressed.

II. Where a defendant makes verbal admissions upon being questioned moments after being placed under arrest, while nude, handcuffed, and surrounded by at least ten federal agents, the totality of circumstances are so inherently coercive as to render those statements involuntary and inadmissible.

III. Where government agents begin to question a defendant immediately after reading *Miranda* warnings to him without first obtaining an oral or written waiver of those rights from him, and where no objective evidence

of voluntary waiver is presented in the record, statements obtained via such questioning must be presumed to be involuntary, and it is reversible error to admit those statements in evidence.

4. STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The following statutory and constitutional provisions involved are set forth in Appendix B, infra, pp. 16a-17a. US Const, Am IV & V; FR Crim P, 41(c).

5. STATEMENT OF THE CASE

On June 5, 1972, Mr. Wilson was indicted in a two-count indictment charging him with possession with intent to distribute quantities of heroin and cocaine in violation of 21 USC §841(a)(1).

On May 10, 1972, at 3:30 p.m., a warrant was issued to search Defendant's alleged home, located in the City of Detroit, for the presence of heroin and cocaine. The probable cause for its issuance was based on an affidavit which recited three contacts between an informant and Defendant while at his home: 1) On or about March 25, 1972, Defendant was allegedly in possession of 1.0 grams of heroin; 2) Some forty-six days later, on May 10, 1972, Defendant allegedly had 7.7 grams of heroin in his possession; 3) Sometime in March, 1972, Defendant is said to have offered over the telephone to sell drugs to an informant.

The warrant was not executed until May 16, 1972, at 1:00 p.m., some six days after its issuance.

On May 16, 1972, between ten and twelve agents of the Federal Bureau of Narcotics and Dangerous Drugs executed the search warrant at defendant's residence at 2526 Calvert, Detroit, Michigan. Forcibly entering the dwelling,

the agents surprised Mr. Wilson, who was standing, completely undressed, in a rear hallway.

Upon discovering on a bedroom nightstand a substance which field-tested to be narcotics, the agents arrested Defendant and handcuffed. Agent Gerard Finnegan advised Defendant of his rights by reading from Federal Form BND-13-A. Defendant was not asked to sign a written form waiving these rights, nor did any agent inquire verbally as to whether Defendant wished to exercise or waive them. Instead, the agents immediately requested Defendant's assistance in opening a locked metal box found in a closet which later proved to contain narcotics. Defendant is alleged to have complied with this request and to have given incriminating answers to questions regarding the presence and location of narcotics on the premises.

During most of this questioning, defendant remained nude and handcuffed, and agents described him as being excited throughout. Defendant denied making the alleged admissions.

Defendant was thereafter tried before a jury. During the course of the trial an evidentiary hearing was conducted on a separate record as to the admissibility of certain statements alleged by the government to have been made by Mr. Wilson during the course of the search. At the conclusion of that hearing, the trial judge ruled that the statements attributed to Mr. Wilson would be received in evidence.

On April 14, 1975, the jury returned a verdict of guilty as to both counts in the indictment.

6. REASONS FOR GRANTING THE WRIT

This case raises several important questions of Federal constitutional and statutory law. The first constitutional

question presented involved the need for clear delineations of those circumstances in which verbal admissions must be deemed to have been made involuntarily, despite the fact that *Miranda* warnings have been given, because an atmosphere of fear and psychological overbearing has been created by arresting officers. See *Miranda* v *Arizona*, 384 US 436, 86 SCt 1602, 16 LEd2d 694 (1966). In the instant case such an atmosphere existed when Defendant's home was invaded by a dozen armed federal agents who surrounded him and began to question him and search the premises as he stood naked, handcuffed and extremely agitated by his predicament.

Another constitutional question presented by this case is whether government agents may begin to question a defendant immediately after reading *Miranda* warnings to him without first obtaining an affirmative oral or written waiver of those rights from him. To the extent that federal courts approve a procedure in which affirmative waiver is not required, the dictates of *Miranda* will become a mere ritualistic incantation, and defendants will not have a meaningful opportunity to reflect upon the wisdom of exercising their rights. In this manner, *Miranda's* goal of protecting defendants' Fifth Amendment rights will be undermined.

Finally, this case presents an important Fourth Amendment question regarding time limits upon the execution of search warrants issued pursuant to Federal Rule of Criminal Procedure 41(c). Where facts constituting probable cause at the time a warrant is issued may well no longer exist by the time the warrant is executed, to permit such delayed execution is to permit searches not based upon probable cause. While most federal cases dealing with this issue rest upon an interpretation of FR Crim

P, 41(c), it is imperative that this Court establish the constitutional imperatives involved in these fact situations.

7. CONCLUSION

For the reasons states above, Petitioner prays that this Petition for Writ of Centiorari to the Court of Appeals for the Sixth Circuit Should be granted.

Respectfully submitted,
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APPENDIX A

No. 75-2089

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED
FEB 16 1976
JOHN P. HEHMAN, Clerk

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RONALD WILSON,
Defendant-Appellant.

ORDER

Before: PHILLIPS, Chief Judge, EDWARDS and MILLER, Circuit Judges.

The defendant appeals his conviction in the court below on a charge of possessing heroin and cocaine with the intent to distribute. The sole issue presented is the admissibility of statements made by the defendant while a number of officers were searching his home. It is argued that the statements were made under circumstances which were so inherently coercive as to render them involuntary.

It appears that a number of officers, pursuant to a valid search warrant, entered the defendant's home and made a search for drugs. A quantity of cocaine found on a table stand was seized as a result of the search and was used as evidence against the defendant at his trial. When the officers first entered the premises, the defendant was un-

dressed and he was immediately handcuffed and then advised of his Miranda rights, which he stated that he understood. In response to questions, the defendant proceeded to make incriminating statements. A few of the statements were made while the defendant was still in the nude, but most of the statements were made after he had been permitted to dress.

Although the search was made under rather unusual conditions, we are persuaded from the totality of the circumstances that defendant fully understood his rights, that the statements made by him of an incriminating nature were made understandingly and voluntarily, and further that the district court did not commit error in admitting in evidence, after conducting a full evidentiary hearing, the statements made by the defendant during the course of the search of his home.

It is therefore ORDERED and ADJUDGED that the judgment of conviction be and the same is hereby AFFIRMED.

ENTERED BY ORDER OF THE COURT.
/s/ JOHN P. HEHMAN
Clerk

No. 73-1869

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant,* v. RONALD WILSON, *Defendant-Appellee.*	APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed February 14, 1974.

Before PHILLIPS, Chief Judge, EDWARDS, Circuit Judge, and O'SULLIVAN, Senior Circuit Judge.

PER CURIAM. In this case the government appeals from an order by the United States District Court for the Eastern District of Michigan, Southern Division, granting defendant's suppression motion pertaining to evidence seized under a search warrant. It was defendant's contention (and the District Judge agreed) that the execution of the search warrant was faulty in that it was served six days after it was issued.

At the time involved in this case, the applicable rule, Federal Rules of Criminal Procedure 41(c) and (d), contained a ten-day limit in relation to service, but also provided that the search warrant should be executed "forthwith." On October 1, 1972, after the events with which we are concerned here, Rule 41 was amended so as to omit the word "forthwith."

Various Courts of Appeals had previously interpreted the rule as allowing for somewhat delayed service within

ten days. *See, e.g., United States* v. *Rael,* 467 F.2d 333 (10th Cir. 1972) (five-day delay caused by lack of sufficient personnel); *United States* v. *Harper,* 450 F.2d 1032 (5th Cir. 1971) (nine-day delay resulting from a desire to arrest accomplices); *United States* v. *Dunnings,* 425 F.2d 836 (2d Cir. 1969), *cert. denied,* 397 U.S. 1002 (1970) (nine-day delay resulting from a desire to arrest defendant); *United States* v. *Nepstead,* 424 F.2d 269 (9th Cir.), *cert. denied,* 400 U.S. 848 (1970) (six-day delay caused by desire to wait until illicit drugs were actually manufactured); *United States* v. *McClard,* 333 F. Supp. 158 (E.D. Ark. 1971), *aff'd,* 462 F.2d 488 (8th Cir.), *cert. denied,* 409 U.S. 988 (1972) (delay of six days caused by weather and dispersal of force). The better reasoned of these cases appear to us to have allowed some delay where the cause or causes of the delay could appropriately be held to be "reasonable." *United States* v. *Harper,* 450 F.2d 1032 (5th Cir. 1971); *United States* v. *Dunnings,* 425 F.2d 836 (2d Cir. 1969), *cert. denied,* 397 U.S. 1002 (1970).

In our instant case the government's rationale for the delayed service was that the informant who had made the purchase would have been endangered by service of the search warrant immediately on the heels of the purchase, that the agent wanted to wait until he had reason to know that a larger amount of heroin was likely to be present, and that in any event, he had ten days in which he could do it at his discretion. The appellee argues that the word "forthwith" means immediately or at least as soon as physically possible. This reasoning, however, does not take into account the fact that the rule does contain a ten-day limit and, as noted above, has been interpreted as allowing for some delay where good reason for it is shown.

Since the rule has been changed so as to give the Magistrate who issues the warrant the responsibility for designating the time for service "within a specified period of time not to exceed ten days," FED. R. CRIM. P. 41(c), this case has little precedential value. As to this case we follow what we have described as the better reasoned of the cases above.

Evidence showed that the informant in this case had made a buy on the same day when the warrant was issued. The agent in charge of the case testified that in such a circumstance, he delayed the service of the warrant to conceal the identity of the informant, unless the government was going to take special measures to protect the informant.

We believe that protection of the informant did constitute reasonable grounds for the delay in this case, and that the finding to the contrary was clearly erroneous. We also believe that there was continuing probable cause on the date of the search and that the motion to suppress should have been denied.

The judgment of the District Court is reversed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff

v.

RONALD WILSON,
Defendant

CRIMINAL
NO. 47268

AMENDED OPINION AND ORDER

The defendant herein has moved to suppress evidence on the ground that the delay between the issuance of the search warrant on May 10, 1972, and its execution on May 16, 1972, was so great as to render the search invalid. The defendant contends, firstly, that the six day delay between the warrant's issuance and execution was violative of the Fourth Amendment and, secondly, that the delay was violative of the Federal Rules of Criminal Procedure.

The defendant's argument that the affidavit in support of the search warrant is insufficient as a matter of law is without merit and will not be discussed.

The defense asserts that for a search made pursuant to a search warrant to be valid, probable cause to search must exist not only at the time of the warrant's issuance but at the time of the warrant's execution as well. The argument is that a magistrate's neutral and detached determination that probable cause exists for a search would be meaningless if the search is permitted after so much time has lapsed that probable cause no longer exists. It is inevitable that time will pass between the issuance of a

warrant and its execution; the question presented by the facts of this case is whether an excessive amount of time was allowed to pass between issuance and execution.

Cases have been called to the Court's attention which indicate that certain kinds of delay require suppression of evidence where so much time has transpired that the facts justifying the finding of probable cause may have changed. For example, a six-day delay between a single observation of gambling and purchasing illicit liquor and the issuance of the warrant has been held to be too long to establish probable cause for the issuance of the warrant. *People* v. *Wright,* 367 Mich 511 (1962). It was held that in order for the search warrant in *Wright* to have been valid, there would have had to have been facts in the affidavit indicating that the offense committed on the day when the observation was made was still being committed six days later when the warrant was issued. It has also been held that a warrant issued on the basis of facts eight days stale is invalid for the reason that the presence of probable cause to believe that marijuana is on the premises of a building on a certain day is not probable cause to believe that it will be in the same building eight days later. *Ashley* v. *State,* 251 Ind. 359 (1968). This Court therefore finds persuasive the defense contention that if a warrant is invalid because it was *issued* six to eight days after the alleged observation of criminal activity, a search *executed* six to eight days after the issuance of a warrant — even if based upon facts observed on the day of its issuance — is likewise illegal.

The only material difference between the instant case and the case cited above is that in the instant case the delay was between issuance and execution and not observation and issuance. What is significant both in the instant

case and in the above-cited cases is that so much time passed that the facts which justified a finding of probable cause may well have changed with the passage of time. It would have been a simple matter, in the context of the case at hand, for an up-dated affidavit to have been resubmitted to a magistrate in order for a fresh search warrant to be approved.

It should be noted that this area of the law is in flux. Indeed, a number of courts have taken a view contrary to that taken by this Court in the instant case. See *U.S.* v. *John Doe*, 19 F.R.D. 1 (E.D. Tenn. 1956); *U.S.* v. *Dunnings*, 425 F. 2d 836 (2nd Cir. 1969); *U.S.* v. *Nepstead*, 424 F. 2d 269 (9th Cir. 1970); *U.S.* v. *Harper*, 450 F. 2d 1032 (5th Cir. 1971). However, the conclusions of law on the part of courts which have reached a result different from that reached in the instant case, based on facts they had at hand, have frequently been similar in many respects to those contained herein. For example, the court in *U.S.* v. *Dunnings, supra*, concluded that the delay in that case was permissible because the probable cause recited in the affidavit continued until the time of execution. The court in *Dunnings* suggested, as did the court in *Nepstead*, that the requirement that the warrant be executed within ten days merely sets the maximum under the Rule — the circumstances of a particular case may require execution in something less than ten days. What constitutes a reasonable delay in executing the warrant will of course depend on the facts and circumstances of each case. *Harper, supra*, at 1043, see also *Spinelli* v. *U.S.*, 382 F. 2d 871, 885 (8th Cir. 1967), rev'd on other grounds, 393 U.S. 410 (1969).

To be sure, there can be no precise rule as to how much time may intervene before an issued search warrant must

be executed, but six days is unreasonable in the absence of a valid excuse for the delay. It was the testimony of the executing officer that the delay was necessary to (1) protect the safety of his informant, (2) obtain a suspected-to-be-delivered larger quantity of contraband, and (3) the officer's understanding that he had ten days in which to execute the warrant. The testimony failed to demonstrate that special protection was needed for the informant; if the executing officer desired to look for a larger quantity of contraband, he should have sought judicial approval; the officer's belief that he had ten days in which to execute the warrant is irrelevant if legally erroneous.

Narcotics, as are involved in this case, are easily transportable and concealable except when present in bulk quantities. While it may be reasonable to search a warehouse for a moonshine still a week after a warrant has been issued for the search — where the illegal apparatus has permanent fixtures attached to it and is so huge in size as to be virtually immovable — it would be wholly unreasonable for a search to be made of a person's home roughly a week after the warrant was issued, for concealable and easily transportable contraband. In the instant case, the affidavit for the search warrant stated that the informant had on one occasion observed approximately 1.0 grams of heroin in the possession of the defendant, and on another occasion had observed approximately 7.5 grams in his possession at the address which was to be searched. Needless to say, both quantities are easily concealable and moveable.

But when the contraband for which the warrant authorizes the search is easily movable and transportable, the material facts upon which probable cause was based can be easily and quickly altered. With contraband of that sort,

it should not be necessary to affirmatively prove that the delay resulted in legal prejudice. In cases involving easily transportable and concealable contraband, where the delay is unreasonable and without justification, the possibility of prejudice is great enough so that prejudice may be presumed.

Admittedly, some ambiguity is contained in the Federal Rules of Criminal Procedure with regard to when a search warrant must be executed. Rule 41(c) states that a search warrant "shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property specified."[1] Rule 41(c) should be interpreted to mean that a warrant should be executed as soon as reasonably practicable but that a delay up to ten days will be permitted if the delay is necessary and unavoidable. This interpretation is consistent with the theory that any ambiguity in the rules should be resolved in favor of the defendant, *Sgro* v. *U.S.*, 287 U.S. 206 (1931); *Mitchell* v *U.S.*, 258 F. 2d 435, 440 (D.C. Cir. 1958) Concurring opinion).

To be read consistent with the dictates of the Fourth Amendment, Rule 41 should be read to mean that an officer may not unduly delay execution of a warrant simply because he discretionarily decides to do so. A delay should be deemed permissible when it is necessitated by a legitimate concern for someone's physical safety, because of the physical inaccessibility of the premises, and other justifications of like magnitude.

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[1] This Amended Order and Opinion takes account of the amendment to Rule 41 which deleted the "forthwith" phrase from the Rule. The deletion was overlooked in this Court's original Order and Opinion, which was entered May 8, 1973.

Inasmuch as the delay between the issuance of the warrant and its execution was unreasonably long, the warrant became invalid and the search and seizure was contrary to both the Fourth Amendment and the Federal Rules of Criminal Procedure. Therefore, for the reasons set forth in this opinion, the evidence must be suppressed.

/s/ DAMON J. KEITH
U.S. District Judge

DATED: May 18, 1973

(Title of Court and Cause)

ORDER AND OPINION

The defendant herein has moved to suppress evidence on the ground that the delay between the issuance of the search warrant on May 10, 1972, and its execution on May 16, 1972, was so great as to render the search invalid. The defendant contends, firstly, that the six day delay between the warrant's issuance and execution was violative of the Fourth Amendment and, secondly, that the delay was violative of the Federal Rules of Criminal Procedure.

The defendant's argument that the affidavit in support of the search warrant is insufficient as a matter of law is without merit and will not be discussed.

The defense asserts that for a search made pursuant to a search warrant to be valid, probable cause to search must exist not only at the time of the warrant's issuance but at the time of the warrant's execution as well. The argument is that a magistrate's neutral and detached determination that probable cause exists for a search would be meaningless if the search is permitted after so much time has

lapsed that probable cause no longer exists. It is inevitable that time will pass between the issuance of a warrant and its execution; the question presented by the facts of this case is whether an excessive amount of time was allowed to pass between issuance and execution.

Cases have been called to the Court's attention which indicate that certain kinds of delay require suppression of evidence where so much time has transpired that the facts justifying the finding of probable cause may have changed. For example, a six-day delay between a single observation of gambling and purchasing illicit liquor and the issuance of the warrant has been held to be too long to establish probable cause for the issuance of the warrant. *People* v. *Wright*, 367 Mich 611 (1962). It was held that in order for the search warrant in *Wright* to have been valid, there would have had to have been facts in the affidavit indicating that the offense committed on the day when the observation was made was still being committed six days later when the warrant was issued. It has also been held that a warrant issued on the basis of facts eight days stale is invalid for the reason that the presence of probable cause to believe that marijuana is on the premises of a building on a certain day is not probable cause to believe that it will be in the same building eight days later. *Ashley* v. *State*, 251 Ind. 359 (1968). This Court therefore finds persuasive the defense contention that if a warrant is invalid because it was *issued* six to eight days after the alleged observation of criminal activity, a search *executed* six to eight days after the issuance of a warrant — even if based upon facts observed on the day of its issuance — is likewise illegal.

The only material difference between the instant case

and the cases cited above is that in the instant case the delay was between issuance and execution and not observation and issuance. What is significant both in the instant case and in the above-cited cases is that so much time passed that the facts which justified a finding of probable cause may well have changed with the passage of time. It would have been a simple matter, in the context of the case at hand, for an up-dated affidavit to have been resubmitted to a magistrate in order for a fresh search warrant to be approved.

To be sure, there can be no precise rule as to how much time may intervene before an issued search warrant must be executed, but six days is unreasonable in the absence of a valid excuse for the delay. It was the testimony of the executing officer that the delay was necessary to (1) protect the safety of his informant, (2) obtain a suspected-to-be-delivered larger quantity of contraband, and (3) the officer's understanding that he had ten days in which to execute the warrant. The testimony failed to demonstrate that special protection was needed for the informant; if the executing officer desired to look for a larger quantity of contraband, he should have sought judicial approval; the officer's belief that he had ten days in which to execute the warrant is irrelevant if legally erroneous.

The Court will observe, parenthetically, that narcotics, as are involved in this case, are easily transportable and concealable except when present in bulk quantities. While is may be reasonable to search a warehouse for a moonshine still a week after a warrant has been issued for the search —where the illegal apparatus has permanent fixtures attached to it and is so huge in size as to be virtually immovable—it would be wholly unreasonable for a search to be made of a person's home roughly a week after the warrant

was issued, for concealable and easily transportable contraband. In the instant case, the affidavit for the search warrant stated that the informant had on one occasion observed approximately 1.0 grams of heroin in the possession of the defendant, and on another occasion had observed approximately 7.5 grams in his possession at the address which was to be searched. Needless to say, both quantities are easily concealable and moveable.

Admittedly, some ambiguity is contained in the Federal Rules of Criminal Procedure with regard to when a search warrant must be executed. Rule 41(d) requires that a search warrant must be executed no later than ten days from the date on which it is issued regardless of whether or not probable cause exists beyond the ten-day period. *Sgro* v. *U.S.*, 287 U.S. 206 (1931). Rule 41(c) requires that an officer executing a search warrant be commanded in the warrant to conduct the search "forthwith." Any ambiguity in the rules should be resolved in favor of the accused, *Sgro* v. *U.S.*, supra; *Mitchell* v. *U.S.*, 258 F. 2d 435,440 (D.C. Cir. 1958) (Concurring opinion). Additionally, the apparent discrepancy between Rule 41 (d) and Rule 41(c) may be interpreted so that the two provisions read consistently. When the two are read together, 41(d) means that a delay up to ten days will be permitted if the delay is necessary and unavoidable. The command of 41(c) that the warrant be executed "forthwith" indicates that an officer may not delay simply because he discretionarily decides to do so, but must execute the warrant as soon as it is practicable to do so. A delay would be permissible when it is necessitated by a justifiable concern for someone's physical safety or because of the physical inaccessibility of the premises.

But inasmuch as the delay between the issuance of the

warrant and its execution was unreasonably long, the warrant became invalid and the search and seizure was contrary to both the Fourth Amendment and the Federal Rules of Criminal Procedure. Therefore, for the reasons set forth in this opinion, the evidence must be suppressed.

IT IS SO ORDERED.

/s/ DAMON J. KEITH
U. S. DISTRICT JUDGE

DATED: May 3, 1973

APPENDIX B

US Const, AM IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

US Const, AM V:

No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FR Crim P, 41(c):

A warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reported or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce

or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

Supreme Court, U. S.
FILED
MAY 14 1976
MICHAEL RODAK, JR., CLERK

No. 75-1339

In the Supreme Court of the United States

OCTOBER TERM, 1975

RONALD WILSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1339

RONALD WILSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) affirming petitioner's conviction is not reported. The opinion of the court of appeals (Pet. App. 3a-5a) reversing the district court's pretrial order suppressing evidence is reported at 491 F.2d 924. The opinion of the district court (Pet. App. 6a-11a) is reported at 60 F.R.D. 55.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1976. The petition for a writ of certiorari was filed on March 17, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a search pursuant to a warrant was unreasonable because it was carried out six days after the issuance of the warrant.

2. Whether petitioner's incriminating statements, made shortly after he had been given *Miranda* warnings, were involuntary.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of two counts of possession of heroin and cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent terms of five years' imprisonment, subject to immediate parole eligibility under 18 U.S.C. 4208(a)(2), and to be followed by concurrent terms of three years' special parole.

Early in the afternoon of May 16, 1972, agents of the Bureau of Narcotics and Dangerous Drugs, accompanied by Detroit police officers, executed a search warrant for petitioner's residence.[1] Agent Gerard Finnegan of the Bureau knocked on the door and announced his presence (Tr. 13). Hearing no response, the officers made a forced entry. They found petitioner standing undressed in a hallway near a rear bedroom (Tr. 14-16). Agent Finnegan told petitioner that the officers (approximately 10 in number) were there to execute a search warrant (Tr. 14). One agent quickly found, on petitioner's nightstand, substances that a field test revealed to be cocaine and heroin. Petitioner was placed under arrest and given *Miranda* warnings (Tr. 24-25). Petitioner acknowledged that he understood his rights (Tr. 64-65).

When petitioner, accompanied by agent Finnegan, arrived in the bedroom, petitioner told the agents that the substances on the nightstand were indeed cocaine

[1]The search warrant had been issued on May 10, 1972. The affidavit in support of the warrant recited that on March 25, 1972, and May 10, 1972, a reliable informant had personally observed quantities of heroin in the possession of petitioner. Copies of the search warrant and supporting affidavit have been lodged with this Court.

and heroin (Tr. 92). In response to agent Finnegan's question whether petitioner had other drugs, petitioner told the agents about a small metal box in a closet in the bedroom (Tr. 190). While an agent was unlocking and inspecting the contents of the box, petitioner was allowed to put on a pair of pants (Tr. 197). The metal box contained heroin and cocaine (Tr. 94-97, 218-220).

The search continued. In the basement of the house the officers found a safe, which petitioner voluntarily opened (Tr. 102, 198-199). The safe contained a brown substance, which petitioner said was cocaine that had gone bad (Tr. 201). Petitioner was allowed to return upstairs and get fully dressed (Tr. 202-203). He later signed a statement that he had been advised of his constitutional rights (Tr. 71-72).

Prior to trial, petitioner moved to suppress the evidence seized pursuant to the warrant, asserting that the warrant should have been executed more promptly. The district court granted this motion, and the court of appeals reversed (Pet. App. 3a-5a, 11a-15a). The district court then held a hearing to determine whether the statements petitioner made during the search were voluntary. Concluding that they were, it admitted them in evidence. Petitioner was convicted, and the court of appeals affirmed.

ARGUMENT

1. The question whether the six-day delay between the issuance of the search warrant and its execution was excessive has no continuing significance—or, as the court of appeals put it, "little precedential value" (Pet. App. 5a)—inasmuch as Fed. R. Crim. P. 41(c) has been amended. At the time of the search Rule 41 provided that warrants should be executed "forthwith," but within 10 days. In 1972, it was amended to provide that the warrant shall specify the period of time within which the search must

be performed, but "not to exceed 10 days." The search here was unquestionably valid under the current rule. And even under the law in force at the time of the search, the delay did not invalidate the search.

The affidavit in support of the warrant recited that a reliable informant had observed narcotics in petitioner's possession at his home on May 10, 1972, the date of the warrant's issuance. At the suppression hearing, agent Finnegan testified that he delayed executing the warrant for two reasons: (1) in order to protect the informant, who was visiting petitioner's residence on a periodic basis and might have been identified if the search had closely followed the observation; and (2) because the informant believed that petitioner was expecting the arrival of a large quantity of narcotics shortly after May 10 (H. Tr. 36-40).[2] On May 15, 1972, the informant advised agent Finnegan that the narcotics had arrived, and the warrant was executed the next day (*id.* at 37).

In these circumstances, the six-day delay between the warrant's issuance and execution was fully justified. Courts of appeals have construed this "forthwith" language of the old Rule to require a search with "reasonable" expedition. See *United States* v. *Bedford*, 519 F.2d 650 (C.A. 3). The concern about delayed execution is, of course, that the information upon which the finding of probable cause is predicated may grow stale during a period of unreasonable delay. Here, the fresh information received on May 15 demonstrates that such concern is inapplicable and that the search was reasonable in this case. See *United States* v. *Rael*, 467 F.2d 333 (C.A. 10); *United States* v. *Harper*, 450 F.2d 1032 (C.A. 5); *United States* v. *Dunnings*, 425 F.2d 836 (C.A. 2), certiorari denied, 397 U.S. 1002; *United States* v. *Nepstead*, 424 F.2d 269 (C.A. 9), certiorari denied, 400 U.S. 848.

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[2]"H. Tr." refers to the transcript of proceedings on petitioner's motion to suppress.

2. Petitioner made incriminating statements shortly after he had been given *Miranda* warnings and after he had acknowledged that he understood them. His contention (Pet. 5) that these statements were involuntary because made in an "atmosphere of fear and psychological overbearing," and because he failed to make an "affirmative oral or written waiver" of his constitutional rights, is insubstantial.

The district court conducted an extensive hearing on this claim. It ruled that the statements, made in petitioner's own house after *Miranda* warnings and petitioner's affirmative acknowledgment to the officers that he understood his rights (Tr. 64-65), were voluntary. Cf. *Beckwith* v. *United States*, No. 74-1243, decided April 21, 1976. The fact that petitioner was unclothed in the presence of numerous law enforcement officers does not, as a matter of law, require the district court to conclude that the statements were involuntary.[3] Indeed, the record supports a finding that petitioner was "quite cooperative" (Tr. 61). The district court properly considered all of the surrounding circumstances. See *Davis* v. *North Carolina*, 384 U.S. 737. Petitioner simply seeks a re-evaluation of the district court's basically factual conclusions.

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[3]Petitioner's assertion that the statements were involuntary because he did not expressly waive his rights to remain silent and to counsel is without foundation. Although the facts and circumstances surrounding the statements must demonstrate that they were made knowingly, intelligently and voluntarily, an express statement, either orally or in writing, waiving these rights is not essential. See *United States* v. *Hayes*, 385 F.2d 375, 377-378 (C.A. 4).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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